NO. 12046

In the United States Court of Appeals for the Ninth Circuit

LEE ARENAS, Appellant
v.
JOHN W. PRESTON, OLIVER O. CLARK AND
DAVID D. SALLEE, Appellees

UNITED STATES OF AMERICA AND
LEE ARENAS, Appellants
v.
JOHN W. PRESTON, OLIVER O. CLARK AND
DAVID D. SALLEE, Appellees

Upon Appeals from the District Court of the United States for the Southern District of California, Central Division

REPLY BRIEF FOR THE UNITED STATES AND LEE ARENAS

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REPLY BRIEF FOR THE UNITED STATES AND LEE ARENAS

ARGUMENT

The fundamental problem in this case is the meaning and effect to be given to the 1894 Act as amended. Although appellees mention that Act, analysis of their argument will show that no consideration is given to the various factors bearing upon the proper construc-

tion of that statute. Hence, appellees do not, in fact, controvert the contentions advanced in appellants' opening brief which demonstrate that the judgment below is plainly erroneous because it is not authorized by the 1894 Act and is directly contrary both to the provisions of that Act and to the policy of Congress as to restricted allotments. For clarity, the arguments advanced by appellees will be discussed under the appropriate headings of appellants' opening brief.

I

The District Court Had No Jurisdiction to Impress a Lien Upon the Trust Patent Allotments or to Enforce Such Lien by Appointing a Receiver or Ordering the Sale of the Property

A. *Introductory—The interest of the United States.* —In our opening brief, pp. 13-15, we have pointed out that although the Indian is the beneficial owner of restricted allotted land, the United States is vitally interested therein and, in fact, in many instances its interest predominates over that of the Indian owner. The interest of the United States is of a governmental nature going far beyond that of the ordinary trustee or guardian whose only duty is to protect the rights of his beneficiary or ward. While making no specific mention of this fact, appellees assert (Br. 21) that the United States is interested in the land "but only as a trustee for Arenas" and elsewhere (Br. 9) it is said that this case "is a matter solely between solicitor and client." But, we submit, the interest of the United States may not thus be disregarded.

That the interest of the United States here is much different from that of the ordinary trustee is further illustrated by the fact that, if the trust patentee should die without heirs, the land would escheat to the tribe and become subject to administration by the United States. *Gerard* v. *United States,* 167 F. 2d 951, 954

(C.C.A. 9, 1948). And, carrying the possibilities further, if the tribe were no longer in existence, the land would be held in trust by the United States for such Indians, within the state where the land is located, as the Secretary of the Interior may designate. Act of November 24, 1942, 56 Stat. 1021, 25 U.S.C. sec. 373(a). Congress could, of course, terminate the latter trust arrangement and provide for escheat to the United States. Hence, it is increasingly clear that any attempt to impress a lien upon the trust patent allotments is a suit against the United States. Cf. *Anglin & Stevenson* v. *United States,* 160 F. 2d 670, 673 (C.C.A. 10, 1947).

B. *The decision below cannot be reconciled with the decision of this Court on the previous appeal (United States* v. *Arenas, 158 F. 2d 730).*—On the last prior appeal in this litigation, this Court agreed that the 1894 Act did not authorize the imposition of liability for costs or other expenses of litigation against the Government. *United States* v. *Arenas,* 158 F. 2d 730, 753 (C.C.A. 9, 1946). But, especially in view of the obligation of the United States to convey a fee title "free of all charge or incumbrance whatsoever" at the end of the trust period, it is obvious that the imposition of a lien upon the allotments is an attempt to impose the costs of the litigation, including attorneys' fees, against the United States. As this Court has already agreed, this cannot be done.

Appellees assert (Br. 21-22) that there is no inconsistency between this Court's decision and the judgment in the instant case. This assertion is apparently based upon two assumptions: (1) that the United States is interested only as trustee and (2) that the judgment is not in terms against the United States. Both of these assumptions are wrong. As we have shown the United States has a governmental interest

in the property. And, as pointed out in our opening brief (pp. 16-17) an attempt to impose a lien for charges on such land is an attempt to impose liability upon the United States. Cf. *United States* v. *Guaranty Trust Co.,* 60 F. Supp. 103, 105 (S.D. N.Y. 1945); *Matter of Albrecht,* 132 Misc. 713, 717, 230 N.Y.S. 543 (N.Y. 1928), aff'd 225 App. Div. 423, 233 N.Y.S. 383 (1929), aff'd 253 N.Y. 537, 171 N.E. 772 (1930).

C. *The United States in the 1894 Act as amended did not consent to imposition of a lien upon the property to secure payment of attorneys' fees.*—In point II appellees argue (Br. 23-26) that the court had jurisdiction to impose a lien upon the allotted lands to secure the payment of attorneys' fees, and in point III (Br. 27-30) they contend that therefore the court had power to sell the property. The error of these arguments is apparent from the fact that nowhere in these two points, even in the headings, which do not conform to appellees' questions presented (Br. 3), is the 1894 Act as amended cited or discussed. Appellees simply assume that if the 1894 Act conferred jurisdiction to allow attorneys' fees, it likewise conferred jurisdiction to impose a lien therefor on the property and to enforce that lien. This assumption is unsupportable. As we have shown (opening brief, pp. 17-21) it is contradicted by the language of the Act itself, the well-settled principles relating to construction of statutes by which the Government consents to be sued and the policy of Congress in relation to attorneys' fees.

D. *The decision below is in direct contradiction to the limitations imposed by Congress upon alienation of the property.*—Here again appellees' argument rests completely on the assumption that if the court had jurisdiction to allow attorneys' fees, it had power to impose a lien upon and to sell the allotted land. Appellees claim that the Government's brief "dwells

at great length upon technicalities of law, but ignores the equities underlying appellees' right to fees and expenses made necessary by its breach of fiduciary duty" (Br. 5). It is, to say the least, surprising to find the basic policy of Congress in Indian affairs—that lands allotted to Indians shall not be alienated in any manner—which has been expressed in the plainest language and most sweeping terms in statutes applicable to this land, characterized as "technicalities of law." It is abundantly clear, and appellees do not deny, that as pointed out in detail in our opening brief (pp. 21-26), the judgment below results in nullification of the restrictions which have heretofore been zealously enforced by the courts.

Even in instances where there is no express statutory limitation upon judicial power, courts of equity will not enforce liens for attorneys' fees in a manner contradictory to declared public policy. For example, they will not aid an attorney to obtain his compensation from an award of alimony (*Turner* v. *Woolworth,* 221 N.Y. 425, 429-430, 117 N.E. 814 (1917); cf. *Romaine* v. *Chauncey,* 129 N.Y. 566, 573-575, 29 N.E. 826 (1892)); a dower interest (*Mooney* v. *Mooney,* 29 Misc. 707, 62 N.Y.S. 769 (N.Y. 1899)); or an award under a Workmen's Compensation Act (*Lasley* v. *Tazewell Coal Co.,* 223 Ill. App. 462 (1921)). In *Turner* v. *Woolworth,* 221 N.Y. 425, 429-430, 117 N.E. 814 (1917), it is well stated:

> The purpose of alimony is support. Equity, which creates the fund, will not suffer its purpose to be nullified. * * * In such circumstances, equity, confining the fund to the purposes of its creation, declines to charge it with liens which would absorb and consume it.

In view of the express congressional provisions with respect to the inviolability of the lands here involved,

the same result, with all the more reason, should apply here. The purpose of allotments is to support and bring about the civilization of the Indian. Certainly there can be no equity in the liquidation of the property which this suit was intended to secure for Lee Arenas. The entire purpose of the 1894 Act as amended and of this suit would thereby be nullified.

E. *The cases relied upon by the court below do not support its assumption of jurisdiction in the instant case.*—Like the court below appellees rely heavily upon *United States* v. *Equitable Trust Co.*, 283 U.S. 738 (1931) and *United States* v. *Anglin & Stevenson*, 145 F. 2d 622 (C.C.A. 10, 1944). These decisions were discussed in our opening brief which pointed out (pp. 26-29) the reasons why neither of them lend support to a conclusion that by the 1894 Act, wherein Congress authorized Indians to sue to establish their rights to trust allotments, the restrictions imposed for the benefit of the Indians were impliedly relinquished. Appellees' only answer is the bare assertion (Br. 16), "In the *Equitable Trust* case the consent of the United States necessary for allowance of fees and expenses was *implied; here consent is expressly given by statute.* (25 U.S.C.A. Sec. 345)". There is no such consent in the 1894 Act as amended.[1]

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[1] Appellees' suggestion (Br. 26) that this Court has already decided the question when it issued its order fixing the fee of Mr. John J. Taheny, including a provision imposing a lien upon the allotted lands to secure such payment (R. 205-207), lacks merit since the order was entered without notice to the United States and, so far as we are advised, without consideration of the present problem. The United States has filed a motion for modification of this order by deleting therefrom all reference to the lien to secure payment of attorney's fees.

II

The District Court Had No Jurisdiction to Entertain a Petition for Allowance of Attorneys' Fees Under the Act of 1894 as Amended

Ignoring the limited scope of the 1894 Act, appellees contend (Br. 6-22) that the district court had the power to make an allowance for attorneys' fees and expenses in the instant case by virtue of its historic equity jurisdiction as invoked by the 1894 Act, the assertion being that in every equity suit the court necessarily has the power to fix fees between attorney and client. But it is perfectly clear that the equitable principles relied upon by appellees have no application here.

In the first place, complete reliance is placed upon the "historic equity jurisdiction" of the federal courts, or "that body of remedies, procedures and practices which theretofore had been evolved in the English Court of Chancery." (Br. 8). The obvious weakness in appellees' argument is that a suit to determine a right to an allotment under the 1894 Act is no part of such "historic equity jurisdiction." *Young* v. *United States,* 176 Fed. 612, 614 (C.C. W.D. Okla. 1910). Both the sovereignty of the defendant and the nature of the relief negative any contention to the contrary. Thus, the jurisdiction of the court below, though equitable in nature, was purely statutory and limited to that specified in the statute. Appellees' contention (Br. 20) that if a court is granted any equity jurisdiction it necessarily is unlimited is plainly erroneous. See Government's opening brief, pp. 17-21, 30-31. Hence, it is plain that the power to allow attorney fees in cases arising under the historic equity jurisdiction does not support the allowance of such fees in a suit under the 1894 Act. Cf. *Lea* v. *Paterson Sav. Inst.,* 142 F. 2d 932, 933 (C.C.A. 5, 1944); *Berry* v. *Root,* 148

F. 2d 945, 946-947 (C.C.A. 5, 1945), certiorari denied 326 U.S. 755. The district court's jurisdiction in the instant case was limited to that prescribed in the 1894 Act and appellees have utterly failed to show how that act conferred any power to determine attorney fees. In fact, it does not.

Secondly, appellees claim that the trial court had jurisdiction to allow attorneys' fees as part of its "historic equity jurisdiction" citing (Br. 8-10) *Sprague* v. *Ticonic Bank,* 307 U. S. 161 (1939); *Trustees* v. *Greenough,* 105 U. S. 527 (1881) and *Louisville E & St. R. R. Co.* v. *Wilson,* 138 U. S. 501 (1891). But as fully explained in the *Sprague* case, these decisions represent applications of the principle that when a plaintiff has successfully recovered a fund in which other persons share the court may properly include the plaintiff's attorney fees in the costs and expenses of litigation which are awarded to the plaintiff. No such situation is presented here. Lee Arenas is the sole beneficiary of the judgment awarded against the United States. Thus, appellees are seeking to enlarge the historic jurisdiction of equity to award attorneys' fees so as to embrace any suit in which the plaintiff recovers money or property. But, "Courts of equity should never attempt to fix the compensation due the attorney in any ordinary litigation. The law courts are open to enforce this class of contracts in action of debt or assumpsit just as they are open to enforce all other contracts for services rendered, whether express or implied." *In re Gillaspie,* 190 Fed. 88, 90 (N. D. W. Va. 1911).

Neither *United States* v. *Equitable Trust Co.,* 283 U. S. 738 (1931) nor *United States* v. *Anglin & Stevenson,* 145 F. 2d 622 (C. C. A. 10, 1944), certiorari denied 324 U. S. 844, support the broad view advocated by appellees. The *Anglin & Stevenson* decision was

expressly based on the rule discussed above that "where an attorney recovers a fund for the benefit of his client and others, those benefited thereby become obligated to pay the cost of the recovery and preservation of the fund, including a reasonable 'between solicitor and client fee'." 145 F. 2d at p. 624. The *Equitable Trust* case was based on a slightly different application of the same fundamental principle. There the suit was brought by the next friend of Jackson Barnett who was legally incompetent and the recovery inured to the benefit of both Barnett and the United States. See *Trustees* v. *Greenough,* 105 U. S. 527, 532-333 (1881), relied upon in the *Equitable Trust* case. Thus, all of the cases cited by appellees were situations where the person actually benefited was required to pay his share of the costs including attorneys' fees. None of them involved, as here, an attempt by an attorney to recover fees against his client who was the sole beneficiary of the judgment. The mere fact that the client is an Indian does not justify expansion of the equity rule. As appellees emphasize (Br. 10-11) Lee Arenas was perfectly competent to contract with them and no reason appears for treating him differently from any other party litigant.[2]

Appellees also rely (Br. 23-24) on decisions holding that an attorney has an equitable lien for his fees upon the product of his labor. But such a lien does not arise from the historic equity jurisdiction. Instead, it exists only when the law of the particular state recognizes this means of enforcing the attorney's contract. *In re Paschal,* 10 Wall. 483, 495-496 (1870); *Central Railroad* v. *Pettus,* 113 U. S. 116, 127 (1885); *German* v. *Universal Oil Products Co.,* 77 F. 2d 70, 72

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[2] It should be noted that Jackson Barnett was not only a restricted Indian but was legally incompetent and hence could not make a contract.

(C. C. A. 8, 1935). The first case cited by appellees on this point (Br. 23) *Webster* v. *Sweat,* 65 F. 2d 109 (C. C. A. 5, 1933) states (p. 110), "Federal courts, although they recognize no common-law lien in favor of attorneys, give effect to the laws of states in which they are held." Nevertheless, appellees treat the matter as if the rule was one of universal application and refer to cases decided by many state courts, omitting, however, any reference to California law.

In *Wagner* v. *Sariotti,* 56 Cal. App. 2d 693, 697, 133 P. 2d 430, 432 (1943) the California law was summarized as follows:

> In this state an attorney has neither a retaining nor charging lien for compensation on a judgment secured by his services in the absence of a contract containing an agreement for a lien.

See also *Ex parte Kyle,* 1 Cal. 331 (1850); California Code of Civil Procedure (Chase, 1947), sec. 1021. Appellees make no claim that such a contract has been made and it is clear there is no such contract. The contract found by the district court to be in force (R. 41-42, 187-188) cannot in any way be construed as providing that appellees were to look to the judgment as security for their fee. It merely provides that Arenas will "pay my said Attorneys upon a quantum meruit basis for services rendered." Indeed, for all that appears Arenas was obligated to make payment for services whether or not the suit was successful. Moreover, the contract, drafted by appellees themselves (R. 136-137), expressly negatives any idea that they were to have recourse to the allotments for their fees and expenses by providing that the payment of compensation was to be "subject to the rules and regulations of the Department of the Interior" (R. 187). One of such regulations, 25 C. F. R. sec. 221.20, provides:

> Debts of Indians will not be paid from funds under the control of the United States, including individual Indian moneys, unless previously authorized by the Superintendent except in emergency cases necessitating medical treatment or in the payment of last illness or funeral expenses as elsewhere herein provided and any other exceptional cases where specific authority is granted by the Indian Office.

Another, 25 C. F. R. sec. 221.21, provides:

> Persons who extend unauthorized credit to Indians do so at their own risk and must look to the debtors themselves for payment. However, all Indians should be urged to pay their just and legitimate debts so far as they may be able. * * *

Thus, by their contract appellees agreed to look to the personal credit of Arenas for compensation without recourse to restricted property.[3] Clearly, they now have no standing to demand payment from the trust patent allotments, but must look to the personal funds of Arenas. See App. Br. 10-11.

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[3] Appellees as attorneys would be presumed to know of the regulations above quoted. That they had actual knowledge is indicated by their submission of the superseded contract (R. 173-182) to the Department of the Interior for approval, and the reply from the Department (R. 185-186). Appellees chose to ignore the regulations (R. 162).

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court should be reversed with directions to dismiss the petition for allowance of attorney fees.

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